

STITES & HARBISON PLLC
ATTORNEYS

RECEIVED
JUL 16 2008

SunTrust Plaza
401 Commerce Street
Suite 800
Nashville, TN 37219
[615] 244-5200
[615] 782-2371 Fax
www.stites.com

July 16, 2008

DEPT OF ENVIRONMENT AND CONSERVATION
OFFICE OF GENERAL COUNSEL

HAND DELIVERED

Appeal of Enforcement Order, TDEC-OGC
20th Floor, L & C Tower
401 Church Street
Nashville, TN 37243-1548

William L. Penny
(615) 782-2308
(615) 742-0707 FAX
bill.penny@stites.com

RE: In the Matter of Randall Stutts, Before the Water Quality Control Board,
Commissioner's Order WPC07-0239

To whom it may concern:

Enclosed herewith is the Appeal and Petition for Hearing on behalf of Randall Stutts, in
the above referenced matter.

Please let me know if you have questions.

Very truly yours,
STITES & HARBISON, PLLC
William L. Penny

Enclosure

cc: Randall Stutts
Paul E. Davis
Devin Wells
Joe Townsend

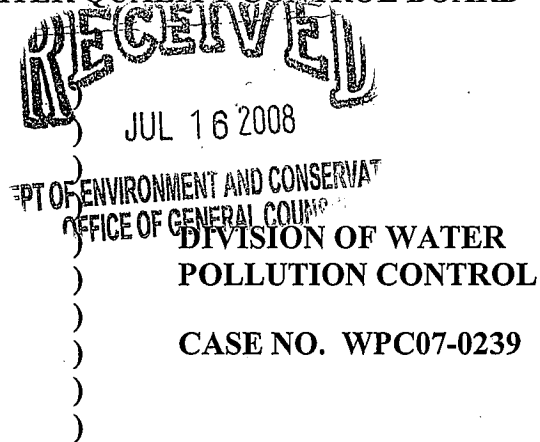
15595N:071431:784323:1:NASHVILLE

BEFORE THE TENNESSEE WATER QUALITY CONTROL BOARD

IN THE MATTER OF:

RANDALL STUTTS
and
JOE TOWNSEND d/b/a TOWNSEND
CONSTRUCTION

RESPONDENTS.



**RANDALL STUTTS' ANSWER TO COMMISSIONER'S ORDER AND ASSESSMENT
AND PETITION FOR HEARING**

Comes now Randall Stutts, ("Mr. Stutts") by and through his counsel, and hereby submits this Answer to the Commissioner's Order and Assessment and Petition for Hearing and for good cause would show:

1. The allegations in Paragraph I are admitted.
2. The allegations in Paragraph II are admitted, but for purposes of this action only, service of process shall be made on the undersigned.
3. That allegations in Paragraph III are admitted.
4. To the extent a response is required for the allegations in Paragraph IV, the allegations are paraphrases of state statutes and rules and Mr. Stutts would deny any such references other than the exact statutory or regulatory language.

5. In response to the allegations in Paragraph V, Mr. Stutts admits that Respondent Townsend and he are persons within the meaning to the cited statute, but denies the remainder of the paragraph.

6. In response to the allegations in Paragraph VI, Mr. Stutts denies the first sentence, but admits the second.

7. To the extent a response is required for the allegations in Paragraph VII, the allegations are paraphrases of rules, and Mr. Stutts would deny any such references other than the exact regulatory language.

8. In response to the allegations in Paragraph VIII, Mr. Stutts admits the first sentence, but denies the remainder of the paragraph.

9. In response to the allegations in Paragraph IX, Mr. Stutts denies that there was any complaint concerning the construction of the dam, but understands that the Tennessee Wildlife Resources Agency observed the completed dam and filed a complaint in General Sessions Court in Cheatham County. That matter is pending. Mr. Stutts admits he entered into a contract with Respondent Townsend with whom he expected to obtain all appropriate permits.

10. In response to the allegations in Paragraph X, Mr. Stutts admits that he cooperated in every way with the Division's investigation. He does not have sufficient information to either admit or deny the observations of Division staff, but would show that at the time of the inspection, the area was experiencing and extreme drought and would deny any impacts downstream of the dam were caused by the impoundment. Further, Mr. Stutts would show that the features of the downgradient stream segment are markedly different from the upgradient

stream segment in terms of substrate, habitat and other features. Mr. Stutts would show that base flow in the downgradient segment was reestablished and is fully supporting. While Mr. Stutts has since learned that Respondent Townsend did not obtain any permits from the Division, he relied upon and fully expected his general contractor to obtain necessary permits. Mr. Stutts is not a land or home developer nor is he in the such business. He was undertaking an improvement on his family's home for the purpose of providing a water source for fire protection. To the extent permits were required, Mr. Stutts was not aware of any requirements but relied upon his licensed general contractor to obtain all necessary authorization and permits, much as any other homeowner would do when making improvements or remodeling their house.

11. In response to the allegations in Paragraph XI, Mr. Stutts admits that the Division issued a Notice of Violation but would deny any language not expressly set out in said notice.

12. Mr. Stutts admits the allegations in Paragraph XII; however, counsel for Mr. Stutts contacted the Division field office on numerous occasions as well as the Division Central Office after November 3, 2007, and clearly stated that Mr. Stutts' plan of correction would be to apply for an after the fact permit. In fact, on December 14, 2007, though eligible for a permit under Nationwide Permit 18, an after the fact permit was submitted to the U.S. Army Corps of Engineers, and an application for an aquatic resource alteration permit (ARAP) was submitted to the Division. The application contained all required elements, including a mitigation plan developed in accordance with the Stream Mitigation Guidance. Despite numerous requests to Division representatives for action on the permit, the Division has never acknowledged receipt, never publicly noticed the application, never inspected the property after receipt of the application, never made a completeness determination and apparently intentionally delayed action for more than six months to permit this enforcement action to precede action on the

permit. To date, Mr. Stutts still has not had a response to his application for a permit despite numerous inquiries.

13. Mr. Stutts admits the allegations in Paragraph XIII.

14. With regard to the allegations in Paragraph XIV, Mr. Stutts does not have sufficient information to either admit or deny the allegations.

15. Mr. Stutts denies the allegations in Paragraph XV.

16. Mr. Stutts denies the allegations in Paragraph XVI.

17. In response to the requirements of the Order in Paragraph XVII, Mr. Stutts would restate that he has a pending application for a permit with the Division which has remained dormant for more than six months, despite numerous inquiries by Mr. Stutts' representatives. Should approval be granted, and Mr. Stutts believes that it should, it would not be appropriate to remove the dam just to rebuild it. After more than six months since the application, Mr. Stutts expects and deserves timely action on his permit application. Mr. Stutts would show that the water quality is enhanced by the impoundment and removing it would be more harmful than having it remain, particularly in light of the generous mitigation plan provided with the application.

18. Any allegations not expressly admitted are hereby denied.

19. As Mr. Stutts' first affirmative defense, he would show that the Division has violated the Permittee Bill of Rights and failing to timely process his permit application. Accordingly it should be deemed granted.

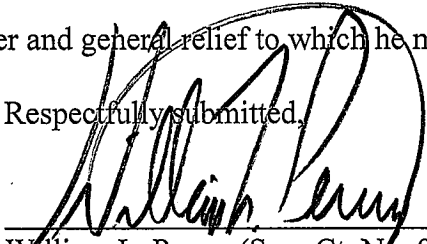
20. As Mr. Stutts' second affirmative defense, he would show that the civil penalties are punitive in nature and would demand a trial by jury as provided in the Tennessee Constitution. In addition, the Civil Penalties were not assessed in accordance with proper procedure.

21. The Commissioner's Order is otherwise arbitrary or capricious, in violation of constitutional requirements, exceeds the authority of the agency and was not based upon proper process and procedure.

22. Motion for More Definite Statement. Pursuant to T.C.A. §4-5-307 and Rule 1360-4-1-.05 (6), Mr. Stutts preserves his right and does makes a motion for more definite statement on the ground that the Commissioner's Order is so indefinite or so uncertain as to ascertain the responsibility among the joint Respondents to properly prepare a defense.

NOW, having fully responded, Respondent Randall Stutts appeals this order and requests a hearing before the Tennessee Water Quality Control Board and at such hearing this matter be dismissed and the Board grant Mr. Stutts application for a permit for his home impoundment. In addition, Mr. Stutts requests such other, further and general relief to which he may be entitled.

Respectfully submitted,



William L. Penny (Sup. Ct. No. 009606)
STITES & HARBISON, PLLC
401 Commerce Street
Suite 800
Nashville, TN 37219-2376
Telephone: (615) 244-5200

Counsel for Respondent, Randall Stutts

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answer to Commissioner's Order and Assessment and Request for a Hearing was served by hand delivery, on this 15th day of July, 2008 upon:

Devin Wells
Assistant General Counsel
20th Floor, L & C Tower
401 Church Street
Nashville, TN 37243

And by U.S. Mail Postage Prepaid to:

Joe Townsend
1134 Sneed Road
Kingston Springs, TN 37082



William L. Penny